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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

YESENIA MELGAR, on Behalf of Herself and All Others Similarly Situated,

Plaintiff,

v.

ZICAM LLC and MATRIXX INITIATIVES, INC.

Defendants.

Case No. 2:14-cv-00160-MCE-AC

PLAINTIFF'S NOTICE OF MOTION AND MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT

Date: November 15, 2018
Time: 2:00 p.m.
Courtroom 7, 14th Floor

Hon. Morrison C. England, Jr.

TO ALL PARTIES AND TO THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE THAT on November 15, 2018 at 2:00 p.m. before the Honorable Morrison C. England, United States District Court Judge for the Eastern District of California, 501 I Street, 14th Floor, Sacramento, California 95814, Plaintiff Yesenia Melgar, by and through the undersigned counsel of record, will move and hereby does move, pursuant to Fed. R. Civ. P. 23(e), for entry of the [Proposed] Order Approving Class Action Settlement ("Final Approval Order").

This motion is based on: (1) this notice of motion and memorandum of points and authorities; (2) the Declaration of L. Timothy Fisher in Support of Motions for Final Approval of Class Action Settlement and for an Award of Attorneys' Fees, Costs and Expenses and Incentive Award, filed herewith; (3) the Declaration of Tina Chiango Regarding Notice to the Class; (4) the papers and pleadings on file; and (5) the arguments of counsel at the hearing on the motion.

Dated: September 19, 2018

BURSOR & FISHER, P.A.

By: */s/ L. Timothy Fisher*
L. Timothy Fisher

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MEMORANDUM OF POINTS AND AUTHORITIES

Plaintiff Yesenia Melgar respectfully submit this memorandum in support of her Motion for Final Approval of Class Action Settlement (the "Motion").

I. INTRODUCTION

This is a class action suit brought by Plaintiff on behalf of herself and all others similarly situated against Defendants Zicam LLC and Matrixx Initiatives Inc. (collectively, "Defendants") for, *inter alia*, deceiving customers by falsely representing that the Zicam Products reduce the duration and severity of a cold.

On June 5, 2018, this Court certified the proposed nationwide class[1] and granted preliminary approval of the Stipulation of Settlement,[2] which requires Defendants to pay $16 million into a Settlement Fund for the benefit of the Settlement Class. Order Granting Preliminary Approval of Proposed Settlement (Dkt. No. 185); *see also* Stipulation of Settlement, Article 2.1. The Settlement includes all persons in the United Sates who purchased the challenged Zicam Products[3] between February 15, 2011, and June 5, 2018. *Id*., Article 1.20. Under the terms of the Stipulation of Settlement, Settlement Class Members will receive (1) a refund based on the manufacturer's suggested retail price ("MSRP") for up to five units of the Settlement Class Products with no proof of purchase, or (2) a refund based on the MSRP for six or more units of the Settlement Class Products if proof of purchase is submitted. *Id*., Article 2.4-2.6. While recoveries will vary based on the number of claims submitted and the number of products claimed by each claimant, Plaintiff estimates that the average recovery for each class member who submitted a claim will be approximately $75-$85. That is a tremendous recovery for each individual class member and is the equivalent of a full refund for more than six Zicam Products. Plaintiff sought to

[1] To avoid repetition, Plaintiff has not included her discussion of Fed. R. Civ. P. 23(a) and 23(b)(3) in this Motion. Plaintiff's arguments regarding class certification can be found in her motion for Preliminary Approval of Class Action Settlement (Dkt. No. 180), § V.

[2] The Stipulation of Settlement ("Settlement" or "Stipulation of Settlement") and its exhibits are attached as Exhibit 1 to the Declaration of Scott Bursor ("Bursor Decl."), filed with the Motion for Preliminary Approval, Dkt. No. 180-1. All capitalized terms herein that are not otherwise defined have the definitions set forth in the Settlement Agreement.

[3] Zicam Products means RapidMelts Original, RapidMelts Ultra, Oral Mist, Ultra Crystals, Liqui-Lozenges, Lozenges Ultra, Soft Chews, Medicated Fruit Drops, and Chewables.

recover a full refund for the Zicam Products at trial. Instead, this same best-case scenario recovery was made available now, to all Settlement Class Members, without further delay or risk.

In accordance with the notice program approved by the Court, direct mail and email notice was sent to more than 164,000 purchasers for whom Defendants had address information. *See* Declaration of Tina Chiango ("Chiango Decl.") ¶¶ 1-10. In addition, on July 5, 2018, the Settlement Administrator launched the 90-day media plan approve by the Court. *Id.* ¶ 10. To date, more than 100,000 Settlement Class Members have submitted claims and only one objection (from an infamous serial objector) and seven requests for exclusion have been submitted in response to notice of the Settlement. *Id.* ¶¶ 13-15. As shown below, the Settlement not only satisfies Rule 23's "fair, reasonable, and adequate" standard, it is an outstanding result for Plaintiff and the Settlement Class. The Court should grant final approval.

II. TERMS OF THE SETTLEMENT

A. Monetary Relief for Class Members

Pursuant to the terms of the Settlement, Defendants will pay $16 million into a Settlement Fund for the benefit of the Settlement Class. Under the Settlement, Class Members who submit valid claims will recover according to the average MSRP during the Class Period for each of the Zicam Products purchased. Stipulation of Settlement, Article 2.4(a). Claims based on purchases of up to five units of the Zicam Products will be paid without requiring proof of purchase. *Id.*, Article 2.5. Claims based on purchases of six or more units of the Zicam Products will require proof of purchase. *Id.* Payment will be adjusted based on the number of claims submitted and the portion of the Settlement Fund available for distribution. This structure will ensure total exhaustion of the Settlement Fund, with every penny going directly to class members (after distribution of costs, attorneys' fees and the incentive award). *Id.*, Article 2.7.

"To assess whether the amount offered is fair, the Court may compare the settlement amount to the parties' estimates of the maximum amount of damages recoverable in a successful litigation." *See Shames v. Hertz Corp.*, 2012 WL 5392159, at *6 (S.D. Cal. Nov. 5, 2012) (citing *In re Mego Fin. Corp. Sec. Litig.*, 213 F.3d 454, 459 (9th Cir. 2000)); *Monterrubio v. Best Buy Stores, L.P.*, 291 F.R.D. 443, 454 (E.D. Cal. 2013) (granting preliminary approval where class

recovery represented "30% of Plaintiff's maximum damages analysis"). Here, the maximum amount of damages that each Settlement Class Member would be entitled to recover if Plaintiff was successful at trial would be the retail price of each of the Settlement Class Products that they purchased. Plaintiff's Expert Designation and Disclosures (Dkt. No. 38), Declaration of Colin B. Weir ¶¶ 6 and 10.

To date, more than 100,000 class members have submitted claims. Chiango Decl. ¶ 15. Plaintiff estimates that each class member who submitted a claim will receive approximately $75-$85 on average depending on the number of claims submitted prior to the October 3 deadline.[4] That is a tremendous recovery for each individual class member because the manufacturer suggested retail price of the Zicam Products ranged from $6 to $12. *See* Exh. A to Stipulation of Settlement (claim form showing average manufacturer's suggested retail price during the class period as ranging from $6.16 to $11.53). Thus, a class member recovering $75 is receiving the equivalent of a full refund for more than six Zicam Products. Plaintiff sought to recover a full refund for the Zicam Products at trial. Instead, this same best-case scenario recovery was made available now, to all Settlement Class Members, without further delay or risk. *See Shames*, 2012 WL 5392159, at *7 (granting final approval of settlement and noting that "[w]hen compared to the estimated actual damages [of $3 a day], the $2 cash option represents a recovery of at least 67% of actual damages" and "compensates each class member for nearly all of—or slightly more than—his or her actual damages"). Therefore, the Settlement benefits are clearly fair to the Settlement Class Members.

B. Release and Discharge of Claims

The Stipulation of Settlement provides for a specific release of all claims or the factual or legal allegations made in the Action, including without limitation the alleged inefficacy of the Zicam Products and/or the purchase of any of the Zicam Products at any time on or after February

[4] This amount is calculated as follows: $16,000,000 - $5,333,333.33 (proposed attorneys' fee award) - $897,220 (estimated notice and claims administration expenses) - $286,526.64 (Class Counsel's costs and expenses) - $10,000 (Plaintiff Melgar's proposed incentive award) = $9,472,920.03. If the total number of valid claims ultimately reaches 120,000, each class member would receive $78.94 on average ($9,472,920.03/120,000). For 110,000 claims, each class member would receive $86.12 on average ($9,472,920.03/110,000).

15, 2011 through June 5, 2018. Stipulation of Settlement, Article 6.1; *see also* Preliminary Approval Order (Dkt. No. 185). The release will forever terminate this litigation involving Defendants and the Plaintiff in this Action, once the Settlement becomes effective as defined in the Stipulation of Settlement, Article 1.10.

C. Payment of Attorneys' Fees and Expenses

The Parties have reached an agreement, in good faith, concerning the award of attorneys' fees and costs to be paid from the Settlement Fund to Class Counsel. Pursuant to the Settlement, Class Counsel will make an application to the Court for an Attorneys' Fee Award in an amount not to exceed one third of the Settlement Fund. *Id.*, Article 3.1. Class Counsel shall also apply separately for an award of their costs and expenses from the Settlement Fund. *Id*.

D. Compensation for the Class Representatives

Pursuant to the Stipulation of Settlement, Plaintiff will petition the Court for approval of an Incentive Award payable to the Class Representative in an amount not to exceed $10,000.00. *Id*., Article 3.2.

E. Payment of Notice and Administrative Fees

The Settlement Administrator's actual costs and expenses of providing notice to the Class and administering the settlement in accordance with the Stipulation of Settlement shall be paid from the Settlement Fund.[5] *Id.*, Articles 2.1 and 4.5.

III. THE STANDARD FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENTS

In evaluating a class action settlement under Rule 23, a district court must determine whether the settlement is fundamentally fair, reasonable, and adequate. Fed. R. Civ. P. 23(e)(2). In evaluating the fairness of a class action settlement, courts are mindful that the law favors the compromise and settlement of class action suits. *See*, *e.g.*, *Churchill Vill., L.L.C. v. Gen. Elec.*, 361 F.3d 566, 576 (9th Cir. 2004); *Class Plaintiffs v. City of Seattle*, 955 F.2d 1268, 1276 (9th Cir. 1992); *Officers for Justice v. Civil Serv. Comm'n*, 688 F.2d 615, 625 (9th Cir. 1982). The *Manual for Complex Litigation* states:

[5] Notice costs also include notification to the Attorney General of the United States and the Attorney General of California in accordance with the Class Action Fairness Act of 2005 ("CAFA"), 28 U.S.C. § 1715(b). *See* Stipulation of Settlement, Article 2.9.

> The judge can encourage the settlement process by asking at the first pretrial conference whether settlement discussions have occurred or might be scheduled.

Manual, Fourth § 13.11 at 167. "Courts have afforded a presumption of fairness and reasonableness of a settlement agreement where that agreement was the product of non-collusive, arms' length negotiations by capable and experienced counsel." *In re Netflix Privacy Litig.*, 2013 WL 1120801, at *4 (N.D. Cal. Mar. 18, 2013). Where, as here, the settlement negotiations were conducted at arm's-length by experienced class action counsel, counsel's assessment and judgment are entitled to a presumption of reasonableness, and the court is entitled to rely heavily upon counsel's assessment and judgment. *Boyd v. Bechtel Corp.*, 485 F. Supp. 610, 622 (N.D. Cal. 1979). Indeed, "the court's intrusion upon what is otherwise a private consensual agreement negotiated between the parties to a lawsuit must be limited to the extent necessary to reach a reasoned judgment that the agreement is not the product of fraud or overreaching by, or collusion between, the negotiating parties, and that the settlement, taken as a whole, is fair, reasonable and adequate to all concerned." *Officers for Justice*, 688 F.2d at 625. Ultimately, however, the decision to approve a settlement is committed to the sound discretion of the trial judge. *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1026 (9th Cir. 1998).

IV. THE SETTLEMENT IS FAIR, ADEQUATE AND REASONABLE

In answering the question of whether a settlement is fair, adequate and reasonable as prescribed by Rule 23(e), district courts have been instructed to balance several factors: (1) the strength of Plaintiff's case; (2) the risk, expense, complexity, and likely duration of further litigation; (3) the risk of maintaining class action status throughout the trial; (4) the amount offered in settlement; (5) the extent of discovery completed and the stage of the proceedings; (6) the experience and views of counsel; and (7) the reaction of the class members to the proposed settlement. *Hanlon*, 150 F.3d at 1026; *Churchill*, 361 F.3d at 575. Here, the balance of the factors demonstrates that settlement warrants final approval because it is fair, adequate and reasonable.

A. Strength of Plaintiff's Case and Risk of Continuing Litigation

In determining the likelihood of a plaintiff's success on the merits of a class action, "the

district court's determination is nothing more than an amalgam of delicate balancing, gross approximations and rough justice." *Officers for Justice*, 688 F.2d at 625 (internal quotations omitted). The court may "presume that through negotiation, the Parties, counsel, and mediator arrived at a reasonable range of settlement by considering Plaintiff's likelihood of recovery." *Garner v. State Farm. Mut. Auto. Ins. Co.*, 2010 WL 1687832, at *9 (N.D. Cal. Apr. 22, 2010) (citing *Rodriguez v. W. Publ'g Corp.*, 563 F.3d 948, 965 (9th Cir. 2009)).

Plaintiff believes that she could prove to a jury that the Zicam Products are mere placebos. That belief is based on the testimony of Plaintiff's experts, the academic literature, and the discovery taken in this action. Indeed, when Class Counsel finally resolved settlement negotiations on the eve of trial, Plaintiff's trial strategy was finalized. Fisher Decl., ¶¶ 2-10 and 27-32; *see generally* Plaintiff's Trial Brief (Dkt. No. 140). But Plaintiff also understands that proceeding to trial poses serious risks. Such considerations have been found to weigh heavily in favor of settlement. *See Rodriguez*, 563 F.3d at 966; *Curtis-Bauer v. Morgan Stanley & Co., Inc.*, 2008 WL 4667090, at *4 (N.D. Cal. Oct. 22, 2008) ("Settlement avoids the complexity, delay, risk and expense of continuing with the litigation and will produce a prompt, certain, and substantial recovery for the Plaintiff class.").

Plaintiff marshaled a technical and persuasive strategy for her case in chief. Nonetheless, Defendants had retained an esteemed cadre of expert witnesses from all over the world to support their defense that the Zicam Products were effective. This impressive group of experts included Dr. Harri Hemila from the University of Helsinki in Finland, Dr. Ronald Eccles from Cardiff University in Wales, Dr. Peter Fisher from the Royal Hospital in London, Dr. Sabrina Sobel from Hofstra University in New York, and Dr. David Stewart from Loyola Marymount University in Los Angeles. Dkt. No. 36. These experts are well-qualified and highly skilled in their respective fields. *Id.* In this "battle of experts," it is virtually impossible to predict with any certainty which testimony would be credited, and ultimately, which expert testimony the jury would accept.

In Class Counsel's experience, these considerations can make the ultimate outcome of a trial highly uncertain. Indeed, after similar battles of experts in cases concerning the effectiveness of over-the-counter drug products, two separate juries concluded that the respective plaintiffs had

not met their burden of proof and found for defendants on every claim. *See Allen v. Hyland's Inc.*, Central District of California Case No. 12-cv-01150-DMG-MAN, Dkt. 426 (Verdict Form); *see also Lewert v. Boiron, Inc.*, Central District of California Case No. 11-cv-10803, Dkt. 447 (Verdict Form). The results of the *Allen* and *Lewert* trials are sobering. These examples make clear that a favorable result cannot be guaranteed for the class. There is no guarantee that the verdict in this action would be any different than the verdict in these trials. *See Shames*, 2012 WL 5392159, at *6 ("Plaintiffs faced significant uncertainty and risk of nonrecovery at trial, making a pre-trial settlement a reasonable tactical choice.").

Beyond the inherent risks of a jury trial, Plaintiff also faced substantial risk from Defendants' motions *in limine*. The Court could have given the jury instructions Plaintiff disfavored, or allowed prejudicial evidence (in Plaintiff's opinion) to be introduced. By settling, Plaintiff avoids the risk of trial and guarantees a recovery to the class. Since the risks of proceeding to trial are substantial, the settlement warrants approval. *See e.g.*, *Nat'l Rural Telecomms. Coop. v. DIRECTV, Inc.*, 221 F.R.D. 523, 526 (C.D. Cal. 2004) ("The Court shall consider the vagaries of litigation and compare the significance of immediate recovery by way of the compromise to the mere possibility of relief in the future, after protracted and expensive litigation. In this respect, 'It has been held proper to take the bird in hand instead of a prospective flock in the bush.'").

Finally, even if Plaintiff were to prevail at trial, the class would face additional risks if Defendants appealed or moved for a new trial. For example, in *In re Apple Computer Sec. Litig.*, 1991 WL 238298, at *1 (N.D. Cal. Sept. 6, 1991), the jury rendered a verdict for plaintiffs after an extended trial. Based on the jury's findings, recoverable damages would have exceeded $100 million. However, weeks later, the Court overturned the verdict, entering judgment notwithstanding the verdict for the individual defendants, and ordered a new trial with respect to the corporate defendant. *Id*. at 2. By settling here, Plaintiff and the Class avoid these risks, as well as the delays and risks associated with the appellate process.

B. Risk of Maintaining Class Action Status

In addition to the risks of continuing the litigation, Plaintiff would also face risks in

maintaining class status through trial and appeal. The class could still be decertified at any time. *See In re Netflix Privacy Litig.*, 2013 WL 1120801, at *6 (N.D. Cal. Mar. 18, 2013) ("The notion that a district court could decertify a class at any time is one that weighs in favor of settlement.") (internal citations omitted). From their prior experience, Class Counsel anticipates that Defendants would likely move to appeal the Court's class certification decision. Here, the Stipulation of Settlement eliminates these risks by ensuring class members a recovery that is "certain and immediate, eliminating the risk that class members would be left without any recovery … at all." *Fulford v. Logitech, Inc.*, 2010 U.S. Dist. LEXIS 29042, at *8 (N.D. Cal. Mar. 5, 2010).

C. Extent of Discovery and Status of Proceedings

The Court must also evaluate whether Class Counsel had sufficient information to make an informed decision about the merits of the case. *See In re Mego Fin. Corp. Sec. Litig.*, 213 F.3d 454, 459 (9th Cir. 2000). The settlement was reached on the eve of trial, after four years of discovery and hard-fought litigation. Given the procedural history of this case, there can be no doubt that Class Counsel had sufficient information to make an informed decision about the merits of this case as compared to the benefit provided by the proposed settlement. *See* Plaintiff's Motion for Preliminary Approval of Class Action Settlement (Dkt. No. 180), § II. Additionally, substantial settlement negotiations have taken place between the Parties and settlement was only reach after Class Counsel fully understood the strengths and weakness of the case. *Schiller v. David's Bridal, Inc.*, 2012 WL 13040405, at *2 (E.D. Cal. June 28, 2012) (granting final approval where the parties "conducted extensive and costly investigation and research … to reasonably evaluate their respective positions … [and] settlement at this time will avoid additional substantial costs, as well as avoid the delay and risks that would be presented by the further prosecution of the Action.")

Notably, when a settlement is negotiated at arm's-length by experienced counsel, there is a presumption that it is fair and reasonable. *See In re Pac. Enterprises Sec. Litig.*, 47 F.3d 373, 378 (9th Cir. 1995); 4/27/2018 Feinberg Decl. (Dkt. No. 180-2) ¶ 12. The Parties also worked closely with no less than four separate mediators. *See* Plaintiff's Motion for Preliminary Approval of Class Action Settlement (Dkt. No. 180), § II.B. Kenneth Fienberg, a renowned and experienced mediator, ultimately facilitated the Parties' resolution. 4/27/2018 Feinberg Decl. (Dkt. No. 180-2)

¶¶ 5, 7-12; *see also In re Bluetooth Headset Products Liab. Litig.*, 654 F.3d 935, 946 (9th Cir. 2011) ("[The] presence of a neutral mediator [is] a factor weighing in favor of a finding of non-collusiveness."). There can be no doubt that Class Counsel was full-informed about the merits of the case.

D. Experience and Views of Counsel

"With regard to class action settlements, the opinions of counsel should be given considerable weight both because of counsel's familiarity with this litigation and previous experience with cases." *Turk v. Gale/Triangle, Inc.*, 2017 WL 4181088, at *3 (E.D. Cal. Sept. 21, 2017) (quoting *West v. Circle K Stores, Inc.*, 2006 U.S. Dist. LEXIS 76558, *17–18 (E.D. Cal. Oct. 19, 2006)). The "trial court is entitled to rely upon the judgment of experienced counsel for the parties....Indeed, the trial judge, absent fraud, collusion, or the like, should be hesitant to substitute its own judgment for that of counsel." *Turk*, 2017 WL 4181088, at *3 (quotation omitted). Deference to Class Counsel's evaluation of the Settlement is appropriate because "[p]arties represented by competent counsel are better positioned than courts to produce a settlement that fairly reflects each party's expected outcome in litigation." *Rodriguez*, 563 F.3d at 967 (citing *In re Pac. Enterprises Sec. Litig.*, 47 F.3d 373, 378 (9th Cir. 1995)).

Here, the Settlement was negotiated by counsel with extensive experience in consumer class action litigation. *See* Fisher Decl. Ex. A (firm resume of Bursor & Fisher, P.A.). Based on their collective experience, Class Counsel concluded that the Stipulation of Settlement provides exceptional results for the class while sparing the class from the uncertainties of continued and protracted litigation

E. Presence of a Governmental Participant

The government need not be involved with a class action settlement. However, the Class Action Fairness Act ("CAFA") requires that notice of the settlement be delivered to the Attorney General of the United States, and to each attorney general of each state where class members reside. 28 U.S.C. § 1715(b). Here, no attorney general has objected. Fisher Decl., ¶ 10. The lack of government involvement weighs in favor of approving the Settlement as agreed to by the Parties. *See Petersen v. CJ Am., Inc.*, 2016 WL 5719828, at *3 (S.D. Cal. Sept. 30, 2016) (granting

final approval of a consumer class action settlement and acknowledged that appropriate notice regarding the settlement and that "no such objections or comments were received.").

F. Reactions of Class Members

To date, there has been only one objection, filed by Patrick S. Sweeney, a serial objector[6] and convicted felon.[7] Chiango Decl. Ex. G. Plaintiff will respond in full to Mr. Sweeney's meritless objection when filing her response to objections on October 17, 2018.

No other Settlement Class Member has objected to the Settlement.[8] Chiango Decl. ¶ 14; *see also Churchill*, 361 F.3d at 577 (weighing the low number of objectors in favor of settlement). The absence of legitimate objections raises a strong presumption that the terms of the Settlement are favorable to the Class. *Nat'l Rural Telecomms. Coop. v. DIRECTV, Inc.*, 221 F.R.D. 523, 529 (C.D. Cal. 2004) ("[T]he absence of a large number of objections to a proposed class action settlement raises a strong presumption that the terms of the proposed class action settlement are favorable to the class members."). Notice was successfully mailed or emailed directly to over 164,000 potential Settlement Class Members (Chiango Decl. ¶¶ 7-8), the Court approved media plan has been active since July 5, 2018, (*id*. ¶10) and more than 100,000 Settlement Class Members have submitted claims. *Id*. ¶15. Despite this massive outreach to, and involvement of, the Settlement Class there has been only one objection and seven additional requests for exclusion. *Id*.

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[6] Mr. Sweeney's history of meritless objections is long enough that instead of providing the record to the Court, he has simply referred the parties to the website www.serialobjector.com. Chiango Decl. Ex.G. As a "professional objector," Mr. Sweeney has been criticized by numerous courts across the country. *See In In re Polyurethane Foam Antitrust Litigation*, 178 F.Supp.3d 635 (N.D. Ohio 2016), (the conduct of Mr. Sweeney and the other objectors "resembles scavenger ants on a jelly roll, scrambling to extort money from the approved settlements."); *Roberts v. Electrolux Home Prods., Inc.*, 2014 WL 4568632, at *12-*15 (C.D. Cal. Sep. 11, 2014) ("The Court has considered the objections of Mr. Sweeney, overrules them in their entirety, finds that they are not made for the purpose of benefitting the Class, and finds that they are meritless in all respects."); *In re TRS Recovery Servs.*, 2016 WL 543137, at *6 n.16 (D. Me. Feb. 10, 2016) (same); *In re Carrier IQ, Inc.*, 2016 WL 4474366, at *5 (N.D. Cal. Aug. 25, 2016) (same); *Chambers v. Whirlpool*, 214 F.Supp.3d 877, 890 n. 7 (C.D. Cal. 2016) (same); *Martin v. Global Marketing Research Services, Inc.*, at 2 (M.D. Fl. Nov. 4, 2016) (same).

[7] On July 21, 2017, Mr. Sweeney pled guilty to violating 18 U.S.C. § 152(3) for bankruptcy fraud. *See United States v. Patrick S. Sweeney*, Case No. 3:16-cr-00103-jdp, Dkt. Nos. 32, 39 (W.D. Wis. July 21, 2017).

[8] The deadlines for filing objections has not yet occurred. The deadline to object o the Settlement is October 3, 2018. After that deadline, Plaintiff will submit a supplemental declaration attesting to the number of objections and opt-outs.

¶¶ 13-14. "[T]he fact that the overwhelming majority of the class willingly approved the offer and stayed in the class presents at least some objective positive commentary as to its fairness." *Hanlon*, 150 F.3d at 1027. The absence of legitimate objections raises a strong presumption that the terms of the Settlement are favorable to the Class. *Nat'l Rural Telecomms. Coop. v. DIRECTV, Inc.*, 221 F.R.D. 523, 529 (C.D. Cal. 2004) ("[T]he absence of a large number of objections to a proposed class action settlement raises a strong presumption that the terms of the proposed class action settlement are favorable to the class members.").

To put these numbers in perspective, of the Settlement Class Members who responded to the notices, more than 100,000 individuals have submitted timely claim forms while only seven individuals have opted out and one has objected (approximately .008% of the total responses). Chiango Decl., ¶¶ 13-15; *Chun-Hoon v. McKee Foods Corp.*, 716 F. Supp. 2d 848, 852 (N.D. Cal. 2010) (where "[a] total of zero objections and sixteen opt-outs (comprising 4.86% of the class) were made from the class of roughly three hundred and twenty-nine (329) members," that the reaction of the class "strongly supports settlement."); *see also Hanlon*, 150 F.3d at 1027 ("[T]he fact that the overwhelming majority of the class willingly approved the offer and stayed in the class presents at least some objective positive commentary as to its fairness"). Here, since there is only one objection from a serial objector and seven exclusion requests, the Court should find that the "presumption of fairness" applies in this Settlement and this factor should weigh heavily in favor of Settlement approval.

V. NOTICE

The Parties agreed to a notice plan, which the Court approved in its Preliminary Approval Order. *See* Dkt. No. 185 at 4 ("The Court determines that the Class Notice, as set forth in the parties' Stipulation of Settlement, complies with all legal requirements, including but not limited to the Due Process Clause of the United States Constitution. Thus, the Court directs that Class Notice shall be given to the Class as provided herein and in Section IV of the parties' Stipulation of Settlement."). The Settlement Administrator implemented the approved notice plan, which informed the Settlement Class of their rights and followed a comprehensive plan for delivery of notice by U.S. postal mail, e-mail, publication, and Internet placement, and was the best notice

practicable given the circumstances of this action. Chiango Decl. ¶¶ 3-12.[9] Furthermore, the notices accurately informed Class Members of the salient terms of the Stipulation of Settlement, the date of the final approval hearing and the rights of all parties, including the rights to file objections and to opt out of the Class. *See* Dkt. No. 185 at ¶¶ 8.b and 8.d. Indeed, this method of giving notice (similar if not identical to the method used in countless other class actions) was appropriate because it provided a fair opportunity for members of the Settlement Class to learn about the Stipulation of Settlement and to make an informed decision regarding the proposed Settlement. Thus, the notices and the procedures embodied in the notices amply satisfy the requirements of due process.

VI. CONCLUSION

For the foregoing reasons, Plaintiff respectfully request that the Court grant final approval to the Stipulation of Settlement and enter the Final Approval Order in the form submitted herewith.

Dated: September 19, 2018

BURSOR & FISHER, P.A.

By: */s/ L. Timothy Fisher*
L. Timothy Fisher

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L. Timothy Fisher (State Bar No. 191626)
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Class Counsel

[9] Pursuant to Stipulation of Settlement, Article 4.5, Plaintiff also asks the Court to authorize the actual costs and expenses of the Settlement Administrator, currently estimated at $897,220, to be paid from the Settlement Fund. The Settlement Administrator will submit an updated cost estimate prior to the Final Approval Hearing on November 15, 2018.